Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HENRY J.N. TAUB,
Petitioner,

v.

CITY OF DEER PARK, TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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10pp

QUESTIONS PRESENTED

1. Where an owner's investment-backed expectation is the development of raw land in a city, zoned (after he acquired the land) for single-family residential use only, and the land cannot be economically developed if limited to the restricted use, has the owner been deprived of the economically viable use of the land, resulting in a taking in violation of the Fifth Amendment Due Process and Just Compensation Clauses?

2. Should the Supreme Court resolve the conflict between its decisions and the decision of the Supreme Court of Texas in this case, where the Texas court did not apply the denial-of-viable-economic-use standard to determine whether there was a taking, but instead held that Petitioner must prove that the regulation rendered his property "wholly useless" or resulted in a "total destruction" of its value?

3. Is a taking "categorical" when the use of land allowed under a restrictive-use ordinance is neither a viable economic use nor in accordance with the owner's investment-backed expectations?

4. Does proof of a claim of regulatory denial of the viable economic use of property depend upon a "before-and-after" valuation test, or may such proof be made by a showing that land cannot economically be used for the restricted purpose?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Henry J.N. Taub ("Petitioner" or "Taub"), petitions for the issuance of a writ of certiorari to the Supreme Court of Texas, to review the judgment of such court in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App. A), styled Henry J.N. Taub v. City of Deer Park, Texas, is reported at 882 S.W.2d 824. The opinion of the Court of Appeals for the Fourteenth Judicial District of Texas (App. B), was not reported.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Texas was entered on June 22, 1994. Petitioner's motion for rehearing was overruled on September 8, 1994 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a) (1988).

CONSTITUTION PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in part:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const., amend. V.

The Fourteenth Amendment to the Constitution of the United States provides, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1]

U.S. Const., amend. XIV, § 1.

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[1] The Fourteenth Amendment is involved only to the extent that it incorporates the Fifth Amendment regarding state action. See *Chicago, B. & Q. Ry. v. City of Chicago*, 166 U.S. 226 (1897).

STATEMENT OF THE CASE

This case involves two condemnation actions by the City of Deer Park, Texas, to take portions of Petitioner's property for street and drainage purposes, which were consolidated with an action by Petitioner against the city to set aside the city's rejection of Petitioner's application to rezone the property.

Prior to the condemnations, the tract held approximately 69 acres of unimproved land which the Taub family had acquired for investment purposes in the 1930's.[2] Of that tract, the portions condemned by the City aggregated approximately 11 acres. In 1971, the City enacted a comprehensive zoning ordinance which, together with surrounding tracts, restricted the use of the property in question to single-family residential use only.

The investment purpose of Petitioner was to develop the property in accordance with its highest and best use. The land is situated in the eastern portion of Deer Park, which is essentially a bedroom community, suburb to Houston, located in the heart of the heavily-industrialized eastern portion of Harris County along the Houston Ship Channel. It is flat, featureless land suitable only for residential, or perhaps light commercial, purposes. One physical feature, however, sets Petitioner's tract apart from all other land in the city: it is crossed by two major pipeline rights-of-way, which make development for single-family residential purposes not only undesirable, but also considerably more difficult and expensive.

When the city filed its condemnations, Petitioner, realizing the difficulties presented by the restriction to single-family residential purposes, filed an application to rezone the tract to multi-family residential. Studies were made and presented to the City Planning Commission of the demographic factors and the economics sup-

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[2] The tract had been set apart to Petitioner and his uncle in 1975 in a partition of nearly six hundred acres which had been acquired in the 1930's. Petitioner inherited his uncle's interest when his uncle died during the pendency of this case.

porting a multi-family residential project. The application was denied at all levels. Petitioner then filed an action attacking the refusal to rezone as arbitrary, unreasonable, confiscatory, and in violation of his rights under the United States and Texas Constitutions to just compensation, alleging that the zoning restriction to single-family use, and the refusal to rezone, denied him any viable economic use of his property.[3]

Petitioner did not attack the constitutionality *per se* of the zoning ordinance, but only its application to his particular property.

At a combined trial of the drainage and street condemnations and the attack on the refusal to rezone, Petitioner demonstrated without dispute that the property could not be economically developed for single-family residential use, the only use which was allowed by the existing zoning restriction. Notwithstanding that showing, which was literally uncontested by the city, the trial court sustained the zoning restriction and the refusal to rezone, and entered awards in the condemnations.

The Texas Fourteenth Court of Appeals sustained the trial court's constitutional rulings but reversed and remanded for correction of errors of form in the judgment.[4] The Texas Supreme

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[3] In Petitioner's Original Petition and Application for Temporary Restraining Order and Temporary Injunction (which was his trial pleading), the constitutional issue was raised by the following allegation (Par. VII.3, page 6):

> The restriction to single family residential use effectively denies to Plaintiffs the beneficial use of their property, thus depriving them of their property without due process of law and without just compensation.

[4] The constitutional point was raised in Petitioner's "Brief of Appellant" in the Court of Appeals, by his Point of Error No. 1 as follows:

> The trial court erred in upholding ordinance No. 819 of the City, as applied to the subject property, such action being contrary to the undisputed evidence that the zoning restriction

Court affirmed the lower courts' rulings on the constitutional questions, but reversed on certain points relating to the calculation of damages to the tract remaining after the condemnation.[5]

Contrary to the standards established by this Court's rulings in *Lucas v. South Carolina Coastal Council,* ____ U.S. ____, 112 S. Ct. 2886 (1992), *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978), *Agins v. City of Tiburon,* 447 U.S. 255 (1980), and other cases cited and discussed below, the Texas Supreme Court held that Petitioner must prove that the governmental restriction rendered the property "wholly useless" or resulted in a "total destruction" of all of its value, basing its decision on a Texas case, *City of Austin v. Teague,* 570 S.W.2d

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[5] The constitutional issue was raised in Petitioner's "Application for Writ of Error" in the Texas Supreme Court, by his Points of Error Nos. 1, 2 and 5, as follows:

> The court of appeals erred in upholding Zoning Ordinance No. 819 of the City, as applied to the Taub property, where the evidence was undisputed that the single-family residential zoning use deprived the owner of the viable economic use of the property and was therefore arbitrary, unreasonable and confiscatory.
>
> The court of appeals erred in upholding the City's denial of Respondent's rezoning application, where the evidence was undisputed that the single-family residential zoning use deprived the owner of the viable economic use of the property and was therefore arbitrary, unreasonable and confiscatory.
>
> The court of appeals erred in failing to apply the proper factors bearing on the question of whether a taking has occurred as a result of governmental interference with the use of property, which are (1) the economic impact of a governmental action on the claimant; (2) the reasonable investment-backed expectations of the property owner; and (3) the character of a governmental action.

389 (Tex. 1978), which cited *Armstrong v. United States,* 364 U.S. 40 (1960) in support of its holding.

Under that standard, the Texas Supreme Court held that "Taub's land is not rendered completely useless or deprived of all economically beneficial use." (Opinion, page 4). It further held that Petitioner's proof of the absence of any economically viable single-family residential use amounted to no more than proof "that the land could not be *profitably* developed when zoned for single-family use." *Id.* (emphasis in original).

By this action, Petitioner seeks to invalidate both the zoning restriction and the rejection of his rezoning application in order to obtain valuations in the condemnations not limited by the invalid use restriction.

REASONS FOR GRANTING THE PETITION

I.

The holdings of the Texas Supreme Court conflict with the applicable standards stated by this Court in *Lucas, Penn Central* and *Agins.*

The correct standard is not that the property must be rendered "wholly useless" or its value "totally destroyed," as held by the Texas Supreme Court. The standard is that the owner is denied the economically viable use of his land. The rule applied by the Texas Supreme Court requires too much of a property owner and allows the government to impose a use restriction on property, without compensation, when some use, *not required to be an economically viable use,* remains to the owner notwithstanding the restriction. That holding is wrong and is in conflict with the decisions of this Court.

The Texas Supreme Court's reliance on *Armstrong* is also wrong. The fact that there was a total destruction of the value of the maritime liens in *Armstrong* does not mean that "total destruction" is the standard for all non-invasive takings. The

Armstrong court was merely deciding the facts before it, not declaring a bright-line rule. *Armstrong* did not establish the standard by which other takings are to be measured and is therefore not useful precedent.

Most recently restated in *Lucas,* this Court finds a "categorical" restriction "where regulation denies all economically beneficial or productive use of land," 112 S. Ct. at 2893, and "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle . . ." *Id.* at 2895 (emphasis in original).

Agins involved a zoning restriction which left available some articulable development for single-family use: the density restriction permitted the owner to build between one and five single-family residences on their *five* acre tract. 447 U.S. at 257. It is not articulable, nor can it ever be conceived to be economically viable, to suggest that a development of between one and five lots — or even fifty or one-hundred lots — remains a viable option to Petitioner on his *fifty-eight* acre tract. In Deer Park, Texas, those are not viable economic options.

In this case, Petitioner's proof was based upon a thorough study of what development was possible in the marketplace, both at the time of the taking and at the time of trial. The evidence clearly demonstrated that an effort to develop the property for single-family residential purposes would be totally frustrated by the cost of the infrastructure (based upon undisputed — frequently stipulated — and conservative market factors), measured against the return which could be reasonably expected from the sale of the projected lots to builders. Based upon optimum utilization and return, *the development would fail.*[6]

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[6] To provide a partial detail here, the evidence was based upon an extensive study of market factors by an acknowledged expert, utilizing the applicable factors extremely conservatively (at times unrealistically conservatively), involving such factors as the most conservative lot

That is a "categorical" taking (although the city did not intend its restriction to be a denial of all use), because, as applied to Petitioner's property, the restriction denies him "all economically beneficial use," forcing him "to leave his property economically idle," *Lucas*, 112 S. Ct. at 2895.

Petitioner's proof demonstrated that the restriction to single-family residential use: (1) forces a significant, use-preclusive economic impact upon him; and (2) wholly frustrates his investment-backed expectations.[7]

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layout on the tract (particularly considering the two pipeline rights-of-way); the marketable lot sizes in Deer Park; the marketable lot price range in Deer Park; the marketable new home price range in Deer Park; the average market lot absorption rate; and normal development expenses (including the significant added cost of dealing with the pipelines). Against those costs, a single "cash sale" of *all* of the lots (a highly unlikely event — but assumed for maximum benefit) was assumed. By all measures, the development would fail, indicating that neither the owner nor any developer would undertake it. All other possibilities were considered and rejected as being even less productive.

[7] We are not dealing here with questions concerning potential noxious use, the proper definition of the affected property right, or an unreasonable expectation on the part of the owner. *Cf. Lucas*, 112 S. Ct. at page 2895; *Id.* at page 2899; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). This case involves a legitimate use, a restriction on a fee simple estate, and a circumstance where Petitioner did not acquire the property in reliance on a state of affairs that included the zoning restriction.

Nor does this case present a "temporary taking" problem as addressed in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), or an "essential nexus" or "rough proportionality" problem as existed in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994), nor a "final decision" problem as explicated in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). This case presents a problem involving a complete taking by an otherwise unexceptional zoning restriction, which taking warrants the invalidation of the restriction on

The opinion of the Texas Supreme Court ignores this Court's standard and fails to give effect to the undisputed economic evidence. In effect, the Texas Supreme Court holds that economic criteria do not apply to an economic analysis. By stating that Petitioner proved only that a development would not be profitable, and stopping there, the court did not finish the analysis. The end of the analysis focuses on the *effect on the use of the property* once it is determined that no profit can occur. If a viable economic use remains, then no taking exists; but if no viable economic use remains, then the restriction imposes a taking.

By its half-way analysis, the Texas court also reverses the priority of the factors it examined. It places greater weight on the simple "lack of profit" conclusion than it places on the effect of the artificial restriction which single-family residential zoning imposes on the use of the property. By stopping with the conclusion that "lack of profit is not enough to show a taking," the court fails to examine what the "lack of profit" conclusion *means* in light of the use restriction. What the "lack of profit" conclusion means is that the only single-family development which is reasonable in the marketplace is not economically possible. The economics of the property *will not support the restricted use.*

The result of the ruling of the Texas Supreme Court is to condemn this particular zoning-restricted unimproved property to remain unused and unproductive. There is only one permitted use — the use required by the city's zoning ordinance; and if that single use is not economically possible, then Petitioner "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good." *Lucas,* 112 S. Ct. at 2895. As

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a permanent basis. This case also involves the impact of that invalidation in an actual condemnation of a portion of the property which was previously subject to the restriction, brought to issue by a rejected application for the removal of the restriction and granting of a new one.

Neither do we have here a "quality of life — character and aesthetic features of a city" problem, as involved in *City of New Orleans v. Dukes,* 427 U.S. 297 (1976), or *Berman v. Parker,* 348 U.S. 26 (1954).

applied to Petitioner's land, the zoning restriction is the equivalent of a prohibition of all productive or "economically beneficial uses," which will leave it "economically idle." *Id.* Contrary to the standard applied by the Texas Supreme Court, the issue *depends upon* the applicable economics, "for what is the land but the profits thereof[?]" *Id.*, at 2894, *citing* 1 E. Coke Institutes, Ch. 1, § 1 (1st Am. ed. 1812).

As expressed in *Lucas*, this Court's "prior takings cases evince an abiding concern for the productive use of, and economic investment in, land . . ." 112 S. Ct. at 2895, n. 8. Petitioner is being deprived of the economic use of his land. He is being left "without economically beneficial or productive options for its use . . ." *Id.* at 2894. Petitioner should not be singled out for that burden; it should be borne by the public as a whole. *Agins*, 447 U.S. at 260.

II.

This case presents the natural progression of this Court's decisions regarding the scope of the Just Compensation Clause as applied to governmental restrictions on the use of land which do not amount to actual physical invasions. From the landmark pronouncements of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) through *Penn Central*, *Agins*, *First English*, *Keystone*, and others, to *Lucas*, the Court has progressively addressed fact situations, in its *ad hoc* application of the Just Compensation Clause, which lead directly to this one.

Pennsylvania Coal established the baseline proposition that when governmental regulation "goes too far," it amounts to a taking, as applied to a situation where a statute effectively prevented the economic use of property. It also began the "economic use" standard when it held that the statute made it "commercially impracticable" to mine anthracite coal. 260 U.S. at 414. *Penn Central* marked the first effort by the Court to establish more specific "guidelines" or "considerations" to assist in the analysis of the impact of use restrictions. Although the

Court in that case held that the architectural restrictions imposed on Grand Central Station did not effect a taking, the Court stated the following criteria to assist in analyzing whether a regulation "goes too far:"

> (1) the character of the governmental action;
>
> (2) the economic impact of the regulation on the claimant; and
>
> (3) the extent to which the regulation interfered with distinct investment-backed expectations of the claimant.

Penn Central represented a situation where the property, already being put to a significant economic use, was not deprived of that use by the restriction. In contrast, this case involves unimproved land, providing no economic benefit.

This case presents the question of whether a compensable taking has occurred when some use remains available, *although not an economically viable use,* after the impact of the restriction is considered, and, further, which use is not the investment expectation of the owner. Since the only use allowed is for single-family residences, and since the land is currently (and was at the time of the taking) wholly undeveloped, the only potential uses remaining to Petitioner are (1) to construct a single house for his residence or for leasing purposes or (2) to develop for construction of a small number of houses. Neither is an economic use of the fifty-eight acres remaining in Petitioner's tract. Neither provides to Petitioner his investment-backed expectations. In a takings analysis, the Court must look at the parcel as a whole. *Penn Central,* 438 U.S. at 130.

In *Agins,* the Court faced a situation where the zoning restriction did not prevent *all* use of the property: the owner in that case was allowed to develop from one to five single-family residences on the five-acre tract. 447 U.S. at 257. This case presents the question left open after *Agins:* is there a taking where a zoning

restriction leaves *no* economic use available? That question was only partially answered in *Lucas.*

Keystone turned on the absence of evidence that the Pennsylvania Subsidence Act made it "impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations." 480 U.S. at 485 (1987). This case presents what was missing in *Keystone:* evidence that it was not economically possible for Petitioner to develop the property, contrary to his expectations, if restricted to single-family use.

First English involved an ordinance which prohibited construction of buildings on property in a flood plain, enacted following the destruction of existing structures by a flood. Presumably other uses could be made of the property, although the owner alleged, and the Court assumed, that all use was destroyed by the restriction. The question was whether a temporary governmental impediment (i.e. a use restriction which existed but which had not been finally determined to be a taking) was sufficient to invoke the mandate of the Just Compensation Clause. The court held that the remedy was available for a temporary taking. *First English* (as well as other temporary taking cases)[8] is significant precedent for this case because a temporary denial of all use (which in theory leaves some use available should the restriction be removed) is analogous to a case where a permanent denial of the viable economic use of the property leaves some use available — although not necessarily an economically viable use. That which was assumed in *First English* (a destruction of the available use) is present here.

Lucas determined that a landowner's right to seek compensation is preserved, notwithstanding potential future use, based upon a trial court finding that the restriction rendered the beachfront

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[8] *See, e.g. United States v. Dow,* 357 U.S. 17 (1958); *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949); *United States v. General Motors Corp.,* 323 U.S. 373 (1945).

lots valueless. *Lucas* involved a purchase of land and commencement of development activities (architectural drawings) prior to the enactment of the state legislation which prohibited the intended use. This case involves land acquired prior to the zoning ordinance in question, held for investment purposes, where, after the imposition of the restriction, because of the size and physical features of the tract (particularly the two pipelines), it could not be *economically* used for the restricted purpose. Where in *Lucas* there was a finding that "no economically viable use" existed, 112 S. Ct. at 2896, this case involves *proof* which establishes that finding, but which was not sustained by the Texas courts because of resort by them to an erroneous legal standard.[9]

Further, this case involves, not a quest for specific compensation for the taking (that will be determined in the condemnation proceedings on remand), but a rejection of the questioned zoning restriction as unconstitutional and therefore void, together with the concomitant proposition that the refusal by the City to rezone was likewise unconstitutional because it upheld the existing invalid restriction. *Lucas,* on the other hand, resulted in a remand, notwithstanding the finding of "no economically viable use," for the purpose of determining whether the restrictions inhered in the owner's "title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." 112 S. Ct. at 2900. In this case, there is no question of whether restrictions inhere in the title, in property law, or nuisance law. There is no basis in this case for a confiscatory restriction to single-family use (preventing all other uses) to be found in the state's law of private nuisance, the state's power to abate public nuisance, or the state's immunity from liability for destruction of property in cases of "grave threats to the lives and property of others." *Id.* at 2900, n. 16.

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[9] It should be kept in mind, however, that the Texas Supreme Court *did* hold that Petitioner proved that the land could not be profitably developed for single-family residential use.

It is a natural progression from *Lucas,* therefore, to consider and determine here the constitutionality of a city zoning ordinance, as applied to Petitioner's property, and of the ordinance which rejected Petitioner's rezoning application, when the restriction is undisputedly shown to have denied to the owner the only beneficial use allowed by the City. As stated in *Lucas,* "an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found." *Id.* at 2902, n. 18 (emphasis in original).

In the "circumstances in which the land is presently found," i.e., at the time of the taking, other beneficial uses, e.g., for multi-family dwellings, were not excluded by relevant precedents. However, if burdened by the single-family use restriction, Petitioner's land has *no* economically beneficial use. That is a taking.

III.

Another important feature of this case is that it provides the Court with an appropriate vehicle to contrast the types of evidence which may serve to establish the "economic impact" aspect of the factors stated in *Penn Central.* Thus, while "before-and-after" valuation evidence has been mentioned in some cases as an appropriate measure of economic impact, *see, e.g., Keystone,* 480 U.S. at 497, such evidence is not the *sine qua non* of the "test," *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962) ("Although a comparison of values before and after" a regulation "is relevant . . . it is by no means conclusive . . . ." *Id.* at 594). This case presents evidence of the effect of the zoning restriction on the ability to make economic *use* of the property, rather than on its value *per se.*

The importance of the impact of the restriction on the *use* of the property, independent of the impact on its *value,* is heightened by the Court's most recent expression concerning the Court's "abiding concern for the productive use of, and economic invest-

ment in, land." *Lucas*, 112 S. Ct. at 2895, n. 8. This expression is a frank recognition of the importance in takings cases, certainly since *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), and continuing through today, of the particular use to which the land is put.[10]

This "abiding concern" has become more apparent with the *Lucas* decision, in which the Court sets forth for the first time the conceptual justification for the denial-of-economically-viable-use rule. Thus, in equating total deprivation of beneficial use with physical appropriation, *Lucas*, 112 S. Ct. at 2894, the Court is saying that destruction of *value* is not an absolute requirement to show a taking. Just as a physical appropriation may not destroy the value of the property (taking possession of property is an example; flooding is a contrary example), a deprivation of use may not destroy value (the property may have value for another use, as an example). *Lucas*, therefore, instructs us that no more need be shown than that the government — a situation which the Court refers to as "relatively rare" — "has deprived a landowner of all economically beneficial uses." *Id.*

In such situations, as in this case, there is no "average reciprocity of advantage." *Id., quoting from Pennsylvania Coal Co. v. Mahon.* Petitioner's property receives the entire burden of the restriction without any corresponding benefit to provide a reciprocity of advantage.

Petitioner has proven that the City of Deer Park has denied him any "economically beneficial or productive options," *Id.*, and therefore has deprived him of all economically beneficial uses.

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[10] *See, e.g., United States v. Causby*, 328 U.S. 256 (1946) (overflights destroyed use of land as chicken farm); *Goldblatt, supra* (ordinance prevented existing use of land for mining sand and gravel); *Penn Central, supra* (ordinance prohibited architectural changes, but did not affect existing uses); *Agins, supra* (ordinance controlled density, not prevent use); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986) (rejection of one of many allowed uses does not establish a final decision as to how regulation applies to property).

CONCLUSION

To review these important questions and to resolve the conflict between the Supreme Court of Texas and this Court, this petition for writ of certiorari should be granted.

Respectfully submitted,

SHEINFELD, MALEY & KAY, P.C.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been served by United States certified mail upon the following on this day of November, 1994:

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APPENDIX A

IN THE
Supreme Court of Texas

No. D-1589

HENRY J.N. TAUB,
Petitioner,

v.

CITY OF DEER PARK,
Respondent.

Argued January 18, 1994

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

JUSTICE SPECTOR delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE HIGHTOWER, JUSTICE HECHT, JUSTICE DOGGETT, JUSTICE CORNYN, JUSTICE GAMMAGE and JUSTICE ENOCH join.

This case presents two issues involving rights of land ownership: first, whether a city's refusal to rezone property amounts to an unconstitutional taking; and second, whether a landowner is entitled to recover for damages to the remainder of property when the portion taken divides the remainder tract in half. The court of appeals approved the trial court's ruling, which upheld the refusal to rezone and awarded no remainder damages in the condemnation. ___ S.W.2d ___[1] We affirm the court of appeals' judgment on the rezoning issue; but on the issue of remainder damages, we conclude that the court of appeals misapplied the law on special benefits. Consequently, we reverse the court of

[1] The court of appeals reversed and remanded to allow correction of errors in the form of the judgment. Neither party complains of this action.

appeals' judgment in part and remand the cause to that court for further consideration.

I.

In 1978, the City of Deer Park filed two eminent domain proceedings on a tract of land owned by Henry J.N. Taub. The City sought 2.4691 acres for street improvements from the southern portion of the tract and another 14.5616 acres to construct drainage ditch structures which would run along the southeastern side of the tract, extend across the tract to the western edge, and then continue along the northwestern section of the tract.

In 1980, Taub filed an application to rezone the southern 69.6684 acres of the parent tract from single-family residential (SF-1) to multi-family residential (MF-1). The northern 49.55 acres of the tract had previously been rezoned from SF-1 to Industrial Parks-1.

In meetings before the Zoning and Planning Commission and the City Council, Taub presented evidence that his tract could not be profitably developed for single-family residential use and that there was a demand in Deer Park for multi-family housing. Deer Park residents, as well as city and school officials, strenuously objected to Taub's rezoning proposal. There was testimony that rezoning Taub's tract for multi-family residential use would require new city facilities and personnel; would cause traffic, water, and sewer problems; and would prevent the City from providing adequate fire, police, or school facilities for the project. After considering the evidence, the Zoning and Planning Commission voted unanimously to deny Taub's application. The City Council accepted the recommendation of the Zoning Commission and denied the request.

In the condemnation proceedings, the special commissioners valued the property to be taken at $7,000 per acre, based on single-family residential use. Accordingly, they awarded Taub

$18,500 for the street taking and $217,000 for the ditch taking. Taub objected to this valuation and filed a separate suit against the City, asserting that the property taken should be valued on the basis of multi-family rather than single-family zoning. The condemnation actions were transferred to the district court and were later consolidated with Taub's suit.

After a bench trial, the trial court rendered judgment for the City, finding that the City's refusal to rezone was not unreasonable or arbitrary and that there was no damage to the remainder of Taub's land as a result of the taking. The court of appeals affirmed.

II.

Taub argues that the City has effectively taken his property by refusing to rezone it from single-family to multi-family residential use, thus preventing him from profitably developing the property. We disagree.

An act short of actual physical invasion, appropriation, or occupation can amount to a compensable taking when a governmental agency has imposed restrictions that constitute an unreasonable interference with the landowner's right to use and enjoy the property. *See City of Austin v. Teague,* 570 S.W.2d 389, 393 (Tex. 1978); *DuPuy v. City of Waco,* 396 S.W.2d 103, 108 (Tex. 1965); *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), *cited in Lucas v. South Carolina Coastal Council,* 112 S.Ct. 2886, 2892 (1992). While it is impossible to state categorical rules for such cases, important considerations are whether property has been rendered "wholly useless," or whether its value has been totally destroyed. *Teague,* 570 S.W.2d at 393 (citing *Armstrong v. United States,* 364 U.S. 40, 48 (1960) (although not every governmental act affecting property constitutes a taking, "total destruction by the Government of all value of [certain] liens" is a taking)).

In the present case, Taub's land is not rendered completely useless or deprived of all economically beneficial use. While the development of the property is limited in scope, it is not altogether precluded. The testimony Taub offered at trial was simply that the land could not be *profitably* developed when zoned for single-family use. The takings clause, however, does not charge the government with guaranteeing the profitability of every piece of land subject to its authority. Purchasing and developing real estate carries with it certain financial risks, and it is not the government's duty to underwrite this risk as an extension of obligations under the takings clause. Taub has failed to show, under these circumstances, a sufficiently severe economic impact. We need not decide whether a more restrictive ordinance would constitute a taking; we simply hold, under the circumstances of this case, that the City's refusal to rezone places no constitutional burden on Taub's property. *See Lucas,* 112 S.Ct. at 2888 (under federal takings clause, addressing a prohibition on any habitable structures on a landowner's land).

Taub asserts that the City's dual role as both a rezoning authority and a condemning authority proves that it acted to its own advantage, in violation of *City of Austin v. Teague,* 570 S.W.2d at 393. Under *Teague,* a landowner may recover damages when the government, acting in the role of an ostensibly neutral arbiter, acts for its own advantage against a landowner's economic interest.

The possibility of conflict is present whenever a governmental entity becomes involved in both condemning and appraising land. We recently addressed this conflict in *State v. Biggar,* __ S.W.2d __, in which we held that the State of Texas improperly used its discretion as arbiter to gain an advantage as the purchaser of land in condemnation proceedings and that this amounted to an unconstitutional taking of property. The landowners in *Biggar* provided evidence that the State denied a routine easement exchange in order to reduce the cost of acquiring a portion of the Biggar tract. Taub, by contrast, presented no

evidence at trial which would show that the City denied his zoning request for the purpose of lowering his property's value for the condemnation proceeding. Instead, he argued primarily that he could not profitably develop his property under the current single-family use ordinance. Without evidence that the City acted to serve its own advantage, we are unwilling to find the refusal to rezone invalid under this theory.

III.

Apart from the takings issue, Taub contends that the court of appeals erred in holding that there were no damages to the remainder of his property. The proposed ditch would divide the tract roughly in half. Taub's expert testified that the cost of building one bridge to unify the tract would be roughly $105,000, and that this amount represented the difference in the value of the remainder before and after the taking. Taub claims that the cost of constructing a bridge to reestablish access to the divided tract fairly and accurately represents the damage he suffered.

The City responds that the proper measure of damages to the remainder is not the cost of building a bridge to unify the tract; rather, it is the difference in the market value of the remainder immediately before and after the taking. *See State v. Carpenter,* 126 Tex. 604, 89 S.W.2d 194, 201 (Tex. Comm'n App. 1936, judgm't adopted). There are no damages to the remainder of property, the City contends, when access is reasonable, rather than naturally or substantially impaired. *See City of Waco v. Texland Corp.,* 425 S.W.2d 374, 376 (Tex. Civ. App. — Waco 1968), *aff'd,* 446 S.W.2d 1 (Tex. 1969). In this case, the remainder tracts still have access to public streets. Finally, the City argues in favor of the court of appeals' holding that any harm suffered by Taub is offset by the ditch, which the City claims provides a special benefit to Taub's property by decreasing its susceptibility to flooding.

We agree with the City of Deer Park that the proper measure of damages for taking only part of a tract is the market value of

the land actually appropriated and the difference, if any, in the market value of the remainder immediately before and immediately after the taking. *See State v. Carpenter,* 89 S.W.2d at 197. Market value is the price the property would bring in a transaction between a willing seller and a willing buyer. *See id.* at 202. The effect of condemnation on the value of the owner's remaining property is to be included in determining damages to the owner. TEX. PROP. CODE ANN. § 21.042(c) (Vernon 1984).

Here, the court of appeals concluded that there was evidence supporting an implied finding that any damage to the remainder of Taub's property would be offset by the special benefit it received from the installation of the drainage ditch. __ S.W.2d __. The evidence indicated that the drainage ditch would facilitate the property's development by upgrading it from a 100-year flood plain to a 500-year flood plain.

Taub argues that any benefit his land has enjoyed is not unique to his tract, but rather is shared in common with the general community, and therefore may not be used to offset damages to him. We agree.

Benefits that a landowner experiences in common with the general community may not be considered in estimating injury or benefit to the owner. TEX. PROP. CODE § 21.042(d) (Vernon 1984); *see also State v. Carpenter,* 89 S.W.2d at 201. General benefits are those common to all property in the vicinity of the condemnee's property; such benefits accrue to landowners within the usable range of the public work. 3 NICHOLS ON EMINENT DOMAIN, § 8A.04[2] (3d ed. 1994). Special benefits are those which arise from the peculiar relation of the land in question to the public improvement, and a benefit may be special even if it is not absolutely unique to the particular property at issue. *Id.* at § 8A.04[2]. The theory underlying the distinction between special and general benefits is that the landowner's recovery should not be reduced by benefits that arise from the condemnation itself and that inure to the community at large, rather than only to the landowner.

We recently reiterated that a special benefit connotes an enhancement more localized than a general improvement in community welfare, but not necessarily unique to a given piece of property. A special benefit is one going beyond the general benefit supposed to diffuse itself from the improvement through the municipality. *State v. Schmidt,* 867 S.W.2d 769, 780-81 (Tex. 1993), *citing Haynes v. City of Abilene,* 659 S.W.2d 638, 641-42 (Tex. 1983); *see also Olson v. Harris Co.,* 807 S.W.2d 594, 595 (Tex. App. — Houston [1st Dist.] 1990, writ denied) (injuries or benefits experienced in common with the community may not be considered in estimating damages).

Here, there is no evidence that the benefit afforded is peculiar to Taub's property; rather, the improvement that placed Taub's tract in the 500-year flood plain benefited the entire eastern half of Deer Park as well. Thus, we hold that any benefit due to the installation of the drainage ditch was general to the community and may not be used to offset any damages to Taub's property.

* * * * *

We conclude that the City of Deer Park's decision to deny Taub's request for rezoning was a reasonable, legitimate exercise of the police power and did not amount to a taking of property. We also conclude, however, that the court of appeals erred in holding that any damages to the remainder of Taub's property were offset by a special benefit due to the ditch installation. Accordingly, we reverse the court of appeals' judgment in part and remand the cause to the court of appeals for further consideration of Taub's complaints regarding the trial court's refusal to award remainder damages.

Rose Spector
Justice

OPINION DELIVERED: June 22, 1994

No. D-1589

IN THE

Supreme Court of Texas

HENRY J.N. TAUB,
Petitioner,

v.

CITY OF DEER PARK,
Respondent.

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

CONCURRING AND DISSENTING OPINION

I agree with the Court that the proper measure of damages for a taking of only part of a tract is the market value of the land actually appropriated and the difference, if any, in the market value of the remainder immediately before and immediately after the taking. However, I would affirm the judgment of the court of appeals because Taub failed to establish damages to the remainder tract. I therefore concur in part the dissent in part with the opinion of the Court.

The basis for damages to a remainder tract is the fact that the property as a whole constituted a single tract prior to the taking; that is, there was unity of use, unity of ownership, and contiguity between the remainder tract and the parcel actually taken.[1] *See*

[1] Thus, when the tract taken is a self-sufficient economic unit independent of the remainder of the tract, with no unity of use between the two tracts, then the owner's recovery should be ascertained by considering only the condemned land. In that case, neither severance damages nor

City of Austin v. Capitol Livestock Auction Co., 453 S.W.2d 461, 463 (Tex. 1970) (citations omitted); *see also* 4A NICHOLS ON EMINENT DOMAIN, § 14B.03[1] (3d ed. 1994). The most troublesome factor for determining whether damages to the remainder are appropriate is determining whether there was unity of use between the tract taken and the remainder tract. *See generally* Nichols, *supra*, § 14B.03[3].

In *Capitol Livestock*, 453 S.W.2d at 464, this Court held that there was no unity of use or unity of ownership in a remainder tract that had been sold prior to the date of the taking. In the present case, the evidence establishes that Taub succeeded in re-zoning the upper half of the tract for light industrial use prior to the date of the taking, while the lower half of the tract remained zoned for single-family residential use. Because Taub is using portions of the remainder tract for different purposes, there is no unity of use for the entire tract, even though there may be unity of ownership and contiguity. *See* Nichols, *supra* § 14B.03[1] ("[W]here an owner has been proven to use portions of what would otherwise constitute a single tract for different and separate purposes, the parts of that single tract, although in unity as to ownership and continguity, may be held to be independent even though they are not physically separated.") A landowner may divide the actual remainder into two parts and seek damages as to only one part. *State v. Oak Hill Joint Venture*, 815 S.W.2d 827, 830 (Tex. App. — Austin 1991, no writ) (citing *State v. Watson*, 448 S.W.2d 720, 721 (Tex. Civ. App. — 1969, writ ref'd n.r.e)). Taub, however, did not do this; instead, he sought to recover damages to the remainder property as a whole. The only evidence Taub provided of market value before and after the taking was as to the *entire* tract. I do not believe that under the present record Taub established damages to the remainder tract because he did not prove that there was unity of use between the parcel taken for

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benefits to the remainder of the property are to be considered. *See DeWitt & Rearick, Inc. v. State*, 531 S.W.2d 862, 865 (Tex. Civ. App. — El Paso 1975, no writ).

the ditch easement and the remainder of his tract.[2] I would therefore affirm the judgment of the court of appeals because Taub did not establish damages to the remainder tract. I otherwise concur with the opinion of the Court.

Raul A. Gonzalez
Justice

OPINION DELIVERED: June 22, 1994

[2] Because I conclude that Taub is not entitled to remainder damages, I would not reach the question of whether the ditch provided an "implied special benefit," as the court of appeals held. ____ S.W.2d ____. *See State v. Schmidt*, 867 S.W.2d 769, 780-81 (Tex. 1993); *see also Olson v. Harris Co.*, 807 S.W.2d 594, 595 (Tex. App. — Houston [1st Dist.] 1990, writ denied) (injuries or benefits experienced in common with the community may not be considered in estimating damages).

APPENDIX B

Reversed and Remanded and Opinion filed July 25, 1991.

[Seal]

IN THE

Fourteenth Court of Appeals

No. A14-90-00292-CV

HENRY J.N. TAUB,
Appellant,

V.

CITY OF DEER PARK,
Appellee.

ON APPEAL FROM THE 165TH JUDICIAL DISTRICT COURT HARRIS COUNTY, TEXAS TRIAL COURT CAUSE NO. 80-35666

OPINION

Henry J.N. Taub appeals from a judgment awarding him approximately one-half the amount at which special commissioners valued his property in condemnation actions filed in county court by the City of Deer Park, appellee. The eminent domain actions, which sought rights-of-way for street improvements and flood control, were transferred to district court and consolidated with Taub's suit to set aside the City Council's unanimous

decision refusing Taub's request to rezone a portion of the tract from single-family to multi-family residential purposes. Taub also sought to enjoin the depositing of the special commissioners' awards totaling $235,500. His application for a temporary injunction was denied, and Deer Park deposited the commissioners' awards on October 8, 1980, thereby fixing the date of taking. After a bench trial, the judge found the city's refusal to rezone Taub's property was a proper exercise of its police powers to benefit the public interest. The trial court awarded Taub $118,610.40, plus interest accrued from the date of taking, as full payment for the land taken. In 26 points of error, Taub complains that (1) Deer Park's refusal to rezone the property deprived him of its beneficial use without just compensation, therefore Ordinance 819 is unconstitutional as applied to his property; (2) the valuations were improperly based upon a use restricted to single-family purposes, and the trial court ignored testimony of damage to the remainder of the property; and (3) the judgment is replete with errors of form. We reverse and remand for entry of a corrected judgment.

Deer Park filed two eminent domain proceedings in 1978, seeking 2.4691 acres for street improvements and 14.5616 acres to construct drainage ditch structures, respectively, out of a 116.456 acre tract that Taub owned within the city limits of Deer Park. Taub filed an application to rezone the south 69.6684 acres of the parent tract from single-family residential (SF-1) to multi-family residential (MF-2). The north 49.55 acres of the tract had previously been rezoned from SF-1 to Industrial Parks-1.

At a meeting of the planning and zoning commission, a large number of Deer Park residents objected to Taub's rezoning proposal, and the commission voted unanimously to deny the application. At a joint public hearing of the commission and City Council, twenty-four citizens, including one representing several hundred residents who had signed petitions, spoke against the application. In addition, the city administrator stated that rezoning the property to allow multi-family housing would seriously

impede Deer Park's ability to provide necessary city services; directors of various city departments agreed that a multi-family housing project would upset a well-planned program for fire and police protection, traffic control, water, sewage, and recreational facilities; and the superintendent of Deer Park schools stated that rezoning would detrimentally alter long-range planning for schools, building programs, bond issues, and students' education. Both the commission and City Council unanimously denied Taub's request.

Special commissioners, appointed by two county court-at-law judges, held valuation hearings and awarded Taub $18,500 for the street taking and $217,000 for the ditch taking. Taub timely objected and filed suit in district court.

First, we consider the constitutionality of Deer Park's zoning ordinance as applied to Taub's property. Zoning is an exercise of a municipality's legislative powers. *City of Pharr v. Tippitt,* 616 S.W.2d 173, 175 (Tex. 1981) (citations omitted). "If reasonable minds may differ as to whether or not a particular zoning ordinance has a substantial relationship to the public health, safety, morals or general welfare, no clear abuse of discretion is shown and the ordinance must stand as a valid exercise of the city's police power." *Id.* at 176 (citing *Hunt v. City of San Antonio,* 462 S.W.2d 536, 539 (Tex. 1971)). Taub has failed to show that the ordinance was not substantially related to public health, safety, and welfare. To the contrary, the evidence shows that (1) Ordinance 819 was adopted in 1971 in furtherance of Deer Park's comprehensive Master Plan; (2) the property had been zoned single-family since 1962; and (3) multi-housing development would drastically affect city services.

Taub contends that despite its benefit to a city's general welfare, an ordinance may be unconstitutional if it renders particular property "wholly useless" or causes a "total destruction" of the entire tract's economic value. *City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802, 806 (Tex. 1984). A restriction is confiscatory if it renders the property "practically worthless." *City*

of West University v. Ellis, 134 Tex. 222, 134 S.W.2d 1038, 1041 (1940). However, based on the SF-1 classification, the value of the land taken for street purposes and the value of its remainder was $7,000 per acre, both before and after the taking, according to Taub's own expert. The trial court agreed in its findings.

Taub adds that the SF-1 classification restricts the property to a use that cannot be economically feasible, thus the economic impact of refusing to rezone the property is *total.* Robert M. Atkinson, Jr., a civil engineer and surveyor, studied the economic feasibility of developing the SF-1 tract with a residential subdivision of homes priced between $60,000 and $75,000. Even leaving out many typical expenses and contemplating that the land would be "donated" to the project, as would be the case if an owner developed the property himself, Atkinson testified the project would "still be about $200,000 in the hole." Gavin P. Parrish, a land developer and home builder, reviewed the Atkinson report and concluded that the project "would leave little room for making any profit and in all likelihood there would be none." Such evidence, however, is insufficient to prove as a matter of law that *any* SF-1 development would not be economically feasible. For example, there is evidence that owners of neighboring property to the south were planning to build homes in the $100,000 range. Further, although Taub contends the property was not suitable for SF-1 development because the tract is encumbered by two pipeline easements that limit the number of lots and potential residences, the Atkinson report failed to consider whether a multi-family project would be feasible in light of Deer Park's claim that it would not be able to provide adequate city services for its residents. We overruled Taub's contention that the ordinance, as applied to his property, is unconstitutional.

In points of error nine and ten, Taub contends the trial court erred in fixing the date of taking as October 8, 1980, and denying his application for injunction. The Texas Property Code provides that after special commissioners award damages, a condemnor may take possession of the condemned property pending further

litigation if it deposits that amount of money with the court. TEX. PROP. CODE ANN. § 21.021 (Vernon 1984). Depositing the amount of award the award fixes the date of the taking. *Audish v. Clajon Gas Co.*, 731 S.W.2d 665, 669-70 (Tex. App. — Houston [14th Dist.] 1987, writ ref'd n.r.e.). Deer Park complied with the statute by depositing $235,500 with the registry of the court on October 8, 1980, thereby fixing the date of the taking. We decline Taub's invitation to fashion an exception to the statute in cases in which a constitutional question is raised. Points of error nine and ten are overruled.

Taub agrees that the street taking caused no damage to the remainder of his property. However, in points of error thirteen through nineteen, he contends the trial court erred in finding there was no damage to the remainder as a result of the ditch taking. First, he complains that the was deprived of the full value of the portion of the ditch adjacent to the tract zoned Industrial because Deer Park valued it at SF-1 rates. However, the record is clear that the adjacent property, taken for the ditch, was zoned SF-1, because the ordinance under which the northern portion of the tract was rezoned as Industrial specifically provided that it was to *abut* the proposed drainage ditch on the west and the south. Second, he contends that the installation of the new drainage ditch destroyed previous access to the west and to the south for the Industrial tract, and previous access to the north and to the east for the SF-1 tract. He claims he should be compensated in the amount of the cost of two bridges to restore previous access. Deer Park responds that following the ditch taking, the SF-1 tract retained access to 13th Street, and the Industrial tract retained access to Highway 225, while a bridge providing access from the SF-1 tract to the Industrial area and Highway 225 could pose a greater threat to residents of a hazardous material accident because of heavy truck traffic transporting volatile petrochemicals. Moreover, there is evidence to support the trial court's implied finding that any damage to the remainder of Taub's property may be offset by the special benefit it received from the installation of the ditch. TEX. PROP. CODE ANN. § 21.042(e)

(Vernon Supp. 1991). Before the drainage improvements, the property fell in the "short-term 100 year-flood plain." After the ditch installation, the property became "developable" in the 500-year flood plain. While drainage improvements were installed to benefit the public generally, the fact that placement of the ditch made Taub's property "developable" is evidence of a significant benefit beyond its general benefit to the community at large. *See Haynes v. City of Abilene,* 659 S.W.2d 638, 641-42 (Tex. 1983). We overrule Taub's points of error regarding damage to the remainder.

Finally, Taub complains that the judgment is replete with errors of form. A condemnation judgement should describe the property to be taken sufficiently to enable a surveyor to locate the property. The description must meet the same requirements as are necessary for a description in a deed. *City of Dallas v. Megginson,* 222 S.W.2d 349, 351 (Tex. Civ. App. — Dallas 1949, write ref'd n.r.e.). Deer Park concedes a computing error in the amount awarded Taub in the judgment, but maintains that no harm results from alleged errors regarding the trial court's failure to describe the three tracts or to apportion the award between the two condemnation suits. Also harmless, according to Deer Park, is language in the judgment divesting Taub of title in land in which only rights-of-way were condemned and in granting rights-of-way for street purposes over property condemned for drainage purposes and vice versa. We hold that the judgment should be reformed to correct a computing error and to more definitely describe the property taken to correspond to the pleadings.

We reverse and remand the cause for entry of a corrected judgment.

/s/ PAUL C. MURPHY
Justice

Judgment rendered and Opinion filed July 25, 1991.

Panel consists of Chief Justice J. Curtiss Brown and Justices Murphy and Cannon.

Do Not Publish — TEX. R. APP. P. 90.

APPENDIX C

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

September 8, 1994

Mr. Joe G. Roady
Sheinfeld Maley & Kay
3700 First City Tower
Houston, TX 77002

Mr. P. B. Dover
P.O. Box 57
Deer Park, TX 77536

Ms. Sheryl Sikes Roper
151 Hickory Ridge
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Mr. Marvin B. Peterson
1200 Travis, Suite 2020
Houston, TX 77002

Mr. William A. Olson, Jr.
Olson & Olson
Three Allen Center, Suite 3485
333 Clay Street
Houston, TX 77002

RE: Case No. D-1589

Style: HENRY J.N. TAUB
v. CITY OF DEER PARK

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

John T. Adams, Clerk

By: /s/ MIA ZIERLEIN
Mia Zierlein, Deputy Clerk

APPENDIX D

D-1

NO. 80-35666

HENRY J.N. TAUB, ET AL VS. CITY OF DEER PARK	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 165TH JUDICIAL DISTRICT

CONSOLIDATED WITH

NO. 81-40155

CITY OF DEER PARK, TEXAS VS. HENRY J.N. TAUB, ET AL	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 165TH JUDICIAL DISTRICT

AND

NO. 81-40455

CITY OF DEER PARK, TEXAS VS. HENRY J.N. TAUB, ET AL	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 165TH JUDICIAL DISTRICT

JUDGMENT

BE IT REMEMBERED, that on this day came on to be heard the above entitled and numbered cause, wherein the City of Deer Park and Henry J.N. Taub, *et al* are parties; and all parties being in open Court and represented by counsel, and having announced ready for trial, the Court directed the trial to proceed.

It was stipulated and agreed, both in writing and in open Court, that the negotiations between the City of Deer Park and Henry J.N. Taub, *et al*, for the purchase of the rights-of-way for the purpose of building street and construction of drainage struc-

tures, and storm sewers for flood control were unsuccessful, and an agreement could not be reached.

That in the judgment of the City Council of Deer Park the acquisition of the property of Henry J.N. Taub, *et al* was necessary for the construction of said public improvements.

That the City Council of Deer Park passed an order authorizing the institution of condemnation proceedings for the acquisition of Henry J.N. Taub, *et al's* property.

That the City Council of Deer Park's First Original Petition in said condemnation proceedings were filed with the Judge of the County Court at Law No. 1 and County Court at Law No. 4 of Harris County, each who thereupon appointed Special Commissioners to hear said causes; and after setting a time and place for hearings of the parties in said causes as required by law, notice of which hearings were duly served upon Henry J.N. Taub, *et al,* said Special Commissioners proceeded to hear the matters in controversy with Henry J.N. Taub, *et al* present in person or by their attorneys of record at such hearings as is shown in the award of the Special Commissioners now on file.

That the Special Commissioners made their awards of the value of the property taken, and filed said awards with the Judges of said Courts.

That within the time prescribed by law, Henry J.N. Taub, *et al* duly filed their objections to said awards and perfected their appeal therefrom to the County Court at Law No. 1 and County Court at Law No. 4.

That the City of Deer Park has the right to condemn and take the property sought in the above entitled cause and described in Plaintiffs' First Original Petition.

That Henry J.N. Taub, *et al* raised no objection to the regularity of the proceedings by which condemnation was instituted; and that the same was regular; and that by Order of Transfer and

Consolidation the District Court has complete jurisdiction to hear all issues in controversy.

That the time of fixing the value of the property of Henry J.N. Taub *et al* and the damages, if any, to the balance of Henry J.N. Taub *et al's* property by reason of the condemnation and taking herein should be the date on which the City of Deer Park deposited with the County Clerk the amount of the Award of the Special Commissioners, which date was October 8, 1980.

The Court further finds:

That the City of Deer Park has incorporated and implemented a comprehensive Master Plan.

That Henry J.N. Taub *et al* filed an Application with the Planning and Zoning Commission seeking rezoning of a 69.6684 acre tract of land, a portion of which is the subject of this proceeding.

That after due notice to all persons desiring to be heard on the matter of the proposed rezoning, a public hearing was held by the City of Deer Park Planning and Zoning Commission. In accord with the governing Ordinance, a joint public hearing of the City Council and the Planning and Zoning Commission was held to consider the request to rezone such acreage. That the Taub interests were represented by their attorney. Testimony from citizens was heard and reports were submitted by various City Departments.

That the City Council, based upon the recommendation of the Planning and Zoning Commission and evidence heard at the joint public hearing, denied the rezoning amendment, whereupon Henry J.N. Taub, *et al* filed suit seeking to have said denial set aside.

Whereupon the City of Deer Park having made and the Court having duly heard and considered a motion for judgment, and such additional considerations and findings as were authorized by

law having been had and made, and the Court being of the opinion that judgment should be rendered. It is therefore

ORDERED, ADJUDGED AND DECREED that the City of Deer Park acted within the legislative power delegated to it by the State and the Texas Constitution.

That Ordinance 819 is a proper exercise of the City of Deer Park's police power and is not unreasonable nor arbitrary.

That the denial by the City of Deer Park to rezone the subject properties was not arbitrary or unreasonable, nor was it confiscatory, but rather was a proper exercise of police powers to benefit the public interest. It is further

ORDERED, ADJUDGED AND DECREED by the Court that Henry J.N. Taub, *et al* do have and recover of and from the City of Deer Park the sum of $118,610.40, of which the sum of $118,610.40 constitutes full payment for the land taken for rights-of-way purposes; and the sum of $0.00 Dollars, constitutes full payment of damages to the remainder of Henry J.N. Taub *et al's* property by reason of such taking; and that upon payment of said sum to Henry J.N. Taub *et al* the City of Deer Park shall be invested with and shall have and recover of and from Henry J.N. Taub *et al* all right title and interest for rights-of-way purposes for the purpose of street construction and drainage ditch and storm sewer construction in, over and upon land designated as Tracts One, Two and Three; and Henry J.N. Taub *et al* shall be divested of all their right title or interest in and to land designated as Tracts One, Two and Three.

And if further appearing to the Court that the City of Deer Park has deposited in the Registry of this Court the amount awarded by the Special Commissioners, the Clerk is ordered and directed, upon this decree becoming final, to pay to Henry J.N. Taub *et al* the sum of $118,610.40, plus any accrued interest on said amount and the balance of said deposit being the sum of $116,889.60 plus accrued interest on said amount having been

deposited in the registry of the Court, the Clerk shall pay over to the City of Deer Park. It is further

ORDERED that all costs of Court in this behalf incurred by and the same are hereby taxed against Henry J.N. Taub, *et al.*

RENDERED this 12th day of February, 1990 at 10:55 o'clock, a.m.

_____

Judge Presiding

APPROVED AS TO FORM:

LAW OFFICES OF MARVIN S. PETERSON

By: _____

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(2)

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No. 94-935

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1994

HENRY J.N. TAUB,
Petitioner,

v.

CITY OF DEER PARK, TEXAS,
Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, City of Deer Park, Texas, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment in this case by the Supreme Court of Texas. The opinion of the Supreme Court of Texas is reported at 882 S.W. 2d 824 and is reprinted in the appendices to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner's statement of the case is misleading, incomplete, and inaccurate. The following accurately reflects the facts material to the Questions Presented in the petition. Unless otherwise indicated, references are to the record in the district (trial) court. "Tr." refers to the Transcript of the record; "S.F." refers to the Statement of Facts; "Px.," "Dx.," and "Jt. Ex." refer to plaintiff's exhibits, defendant's

exhibits, and joint exhibits, respectively. References to "Pet." are to the Petition for Writ of Certiorari.

For clarity, Petitioner will be referred to as "Taub" and Respondent will be referred to as "Deer Park" or "City."

The issue presented in this case is whether a Deer Park zoning regulation restricting the use of Taub's property to single-family residential purposes constitutes an "economic taking."

Taub was the owner of a 69.6684 acre tract of land (hereinafter referred to as the "Tract") located within the corporate limits of Deer Park. (S.F. Vol. 2, p. 106). His family acquired the Tract in the 1930s. (S. F. Vol. 2, p. 117). Taub acquired his interest in the Tract through inheritance. (S.F. Vol. 2, p. 106).

In 1978, Deer Park filed two eminent domain proceedings to acquire certain portions of the Tract. The City sought 2.4691 acres for street improvements and another 14.5616 acres to construct a drainage ditch. Special Commissioners were duly appointed, hearings were conducted, and awards were made for the value of the property taken and the damage to the remainder. Taub duly filed objections to such awards and perfected an appeal. (S.F. Vol. 3B, Jt. Ex. C).

Deer Park originally enacted a comprehensive plan and zoning ordinance in 1963. In 1971, the City's comprehensive plan was updated and the current zoning ordinance was enacted. The Tract is zoned single-family residential under the provisions of such ordinance. (S.F. Vol. 3B, Jt. Ex. A). The zoning classification of the Tract remained single-family residential without dispute until 1980 when, prior to the trial of his appeal of the condemnation

awards, Taub filed an application with the Planning and Zoning Commission of Deer Park seeking to rezone the Tract, including portions of the land sought to be condemned by Deer Park, from single-family residential to multi-family residential. (S.F. Vol. 4, Px. 7).

The Planning and Zoning Commission and City Council timely conducted public hearings on Taub's rezoning application. In such hearings, Deer Park residents, as well as City and school officials, strenuously objected to Taub's rezoning request. There was substantial testimony that rezoning the Tract for multi-family residential use would seriously impede Deer Park's ability to provide adequate and necessary City services. Directors of various City departments agreed that multi-family housing on the Tract would upset a well-planned comprehensive program for fire and police protection, traffic control, water and sanitary sewer services, and recreational facilities. The superintendent of the Deer Park Independent School District testified that the proposed rezoning would detrimentally alter long-range planning for schools, building programs, bond issues, and student education. Both the Planning and Zoning Commission and the City Council voted unanimously to deny Taub's request. (S.F. Vol. 3B, Jt. Ex. B).

Taub then filed in district court his Original Petition and Application for Temporary Restraining Order and Temporary Injunction alleging that Deer Park's refusal to rezone his property from single-family residential to multi-family residential was arbitrary, unreasonable, and confiscatory because the restriction denied him the beneficial use of his property, thus depriving him of such property without due process of law and without just compensation. (Tr. 6, 11). In such proceeding, Taub sought to enjoin the filing of the awards in the condemnation proceedings, thereby delaying the date of the taking until such time that

the validity of the City's denial of his rezoning request could be determined. Taub asserted that if the denial of his rezoning request were adjudged improper, he would be entitled to valuation of a portion of the condemned tracts, and any damage to the remainder, on the basis of their value for multi-family residential purposes, which he alleged would result in the Tract having a much higher value. (Tr. 10). The condemnation proceedings filed by the City were transferred to the district court and consolidated with Taub's action. (Tr. 71). The trial court found that rezoning the Tract from single-family residential to multi-family residential would seriously impede the City's ability to provide necessary services for the health, safety, and welfare of its citizens, that Deer Park's zoning regulations were not unreasonable or arbitrary, that the City's refusal to rezone the Tract was not unreasonable or arbitrary, or confiscatory, and that the value of the property condemned by Deer Park was $7,000 per acre. (Tr. 166-169).

Taub does not challenge the legitimacy of the governmental action in this case, nor does he contend that the zoning regulation does not substantially advance legitimate state interests. In fact, he admits that the City's zoning regulation was adopted to accomplish a legitimate goal and that it is substantially related to public health, safety, and general welfare. (Petitioner's Application for Writ of Error to the Supreme Court of Texas, p. 23). The gravamen of Taub's challenge is based on the argument that inclusion of the Tract within the City's single-family residential zoning district is confiscatory and invalid because it denies him any viable economic use of such property and therefore amounts to an "economic taking."

In his Petition for Writ of Certiorari Taub represents, as established fact, that the governmental action denied him any viable economic use of the Tract. Neither the record in

this case nor the findings of the courts below support this representation.

The only evidence offered by Taub that the City's actions deprived him of any viable economic use of the Tract consisted of an engineering study (S.F. Vol. 4, Px. 1) which assumed Taub's property would be developed into a subdivision with a specified lot size, lot price, home size, and home price range. The study concluded, based on such assumption, that a single-family residential development on the Tract would not be profitable. The study did not consider alternative schemes for single-family residential development, nor did it consider future prospects of profitable development for such purposes. In other words, the study was limited to a single development scenario from a snapshot in time.

Additional evidence contradicts Taub's assertion that the City's zoning restriction denied him any viable economic use of the Tract. That evidence relates to the market value of the Tract. It is uncontroverted that the Tract has substantial market value. Taub testified that, in his opinion, the Tract's value for single-family residential purposes was about $15,000 per acre. (S.F. Vol. 2, p. 112). Taub's own expert appraiser testified that the Tract had a fair market value of $7,000 per acre. (S.F. Vol. 2, p. 84; S.F. Vol 4, Px. 4). This valuation took into consideration the highest and best use of the Tract as restricted by its single-family residential zoning. (S.F. Vol. 4, Px. 4, p. I-2). The appraiser could not have determined such value without concluding that the Tract could be profitably developed or that its profitable development was anticipated.

Taub testified that he, and his family before him, held the Tract simply as an investment. (S.F. Vol. 2, p. 130, 132). There is no evidence that he was in the real estate

development business or that he had any intent or desire to develop the Tract. It appears that he was interested in rezoning the Tract to a multi-family residential classification because of the potential increase in its market value, an increase which would affect both the award in the condemnation proceedings and the proceeds from any future sale of the property.

The uncontroverted evidence in this case clearly establishes, and the courts below found, that: (1) the City's land use regulation advances a legitimate state interest which has a substantial relationship to public health, safety, morals, and general welfare; and (2) the impact of the regulation did not render Taub's land useless or deprive him of all economically beneficial use thereof. After weighing the public and private interests involved, the Supreme Court of Texas correctly concluded that Taub had failed to show a sufficiently severe economic impact to establish an "economic taking." (Pet. A-4).

REASONS WHY THE PETITION SHOULD BE DENIED

The Supreme Court of Texas followed the standards promulgated by this Court in determining whether Deer Park's single-family residential zoning classification of the Tract constitutes an "economic taking."

No "set formula" has been established to determine whether or not a particular governmental regulation results in an economic taking. Instead, this Court has preferred to engage in essentially ad hoc, factual inquiries. Several factors have particular significance in the determination of an economic taking case: (1) the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations; and (2) the character of the

governmental action. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

The first inquiry should examine the extent of economic impact on the claimant resulting from the regulation and the legitimacy of the state interest. Generally, if a zoning ordinance denies an owner all economically viable use of his property, or does not substantially advance legitimate state interests, it effects a taking. *Lucas v. South Carolina Coastal Council*, ___U.S.___, 112 S.Ct. 2886, 2894 (1992); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

The leading cases which have held that takings occurred as a result of economic impact have been based on findings that the properties in issue were rendered wholly useless or their values totally destroyed, thus denying all economically beneficial or productive use of such properties. *Lucas; First English Evangelical Lutheran Church of Glendale v. City of Los Angeles, Cal.*, 482 U.S. 304 (1987); *Armstrong v. United States*, 364 U.S. 40 (1960); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Property is rendered wholly useless when the governmental regulation prohibits any use of the property or the regulation is so burdensome that it has the effect of rendering the property valueless. In *Lucas* and *First English*, the governmental regulation actually prohibited any meaningful use of the property. In *Armstrong*, the total value of the property was destroyed. In *Pennsylvania Coal*, the governmental regulation made use of the properties impractical to the extent they were rendered useless for the investment backed expectations of the owners.

Decisions sustaining land use regulations which are reasonably related to the preservation and promotion of general welfare uniformly reject the proposition that

diminution in property value, standing alone, can establish a taking. *Penn Central*, 438 U.S. at 131. See also *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (92.5% diminution in value). Absent a finding that the governmental regulation does not substantially advance legitimate state interests or that it denies an owner all economically viable use of his property, the question of whether the governmental action constitutes a taking requires a weighing of public and private interests. In those situations where a zoning regulation substantially advances legitimate governmental goals, the benefits to the public must be considered along with any diminution in market value that the property owner might suffer. *Agins*, 447 U.S. at 261-262. The determination of whether a taking occurs requires an ad hoc, factual inquiry into the character and legitimacy of the governmental action weighed against the extent of diminution in value. *Agins*; *Penn Central; Pennsylania Coal.* Such a balancing is required in this case.

These standards for review in an economic taking case are precisely the standards followed by the Supreme Court of Texas in rendering its decision in this case. The court recognized that "[A]n act short of actual physical invasion, appropriation, or occupancy can amount to a compensable taking when a government agency has imposed restrictions that constitute an unreasonable interference with the landowner's right to use and enjoy the property.". (Pet. A-3). The court's first inquiry examined the extent of economic impact Deer Park's zoning regulation had on Taub's Tract. It recognized the importance of the consideration of whether Taub's property had been rendered wholly useless or whether its value had been totally destroyed, noting that total destruction by the government of all value is a taking. (Pet. A-3). However, the court found that "Taub's land is not rendered completely useless or

deprived of all economically beneficial use."[1] (Pet. A-4). The court then properly weighed the character of the governmental action and its uncontested legitimacy against the economic impact of such action on Taub's Tract. It's conclusion was that Taub failed to show, under the circumstances of this case, a sufficiently severe economic impact to constitute a taking (Pet. A-4).

In this case, Taub failed to show any deprivation significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

The hypothesis of Taub's argument that the holdings of the Supreme Court of Texas conflict with applicable standards established by this Court, and that such holdings were in error, is predicated on the assumption that Deer Park's zoning ordinance denies him all economically beneficial use of his property. Taub's assumption is contrary to the evidence presented in this case and to the findings of the courts below.

The only evidence presented by Taub regarding the economic impact of the City's zoning restriction was an engineering study. The study was limited in scope, and its opinion regarding profitability was drawn from a narrowly defined scheme of single-family residential development which considered only economic conditions existing at the point in time of such study. The study failed to consider both future prospects for profitable development of the Tract

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[1] Taub's statement in footnote 9 on page 12 of his Petition that the "Texas Supreme Court *did* hold that Petitioner proved that the land could not be profitably developed for single-family residential use" is incorrect. The court made no such holding.

for single-family residential purposes or alternative single-family development schemes.

The determination of economic impact must include time as a factor; it cannot be validly judged from a snapshot in time. If such were the case, the impact of each and every zoning action would be measured by temporary economic conditions only, without regard to factors realistically affecting profitability which are totally unrelated to the zoning regulation. With or without zoning, temporary market conditions frequently make property unsuitable for immediate development. Surely there are thousands of zoned tracts of land in this country which are not subject to profitable development at this moment; however, each may have substantial value based upon reasonably anticipated changes in economic conditions or other market factors. Such anticipated changes might include simple upward turns in the local or national economies or something more definite, such as the extension of roadway or drainage systems, or water or sewer facilities, the development of adjacent or neighboring properties, or demand resulting from the influx of population. Under such circumstances the properties maintain substantial value because of the reasonable anticipation of their future profitable development.

In addition, Taub offered no evidence of profitability using alternative development schemes.[2] The demand for housing is not fixed to a particular lot size or price range. The market for housing may include a wide range of

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[2] Taub's statement in footnote 6 on page 6 of his Petition that "[A]ll other possibilities were considered and rejected as being even less productive" is inaccurate. There was no evidence presented at trial to that effect nor was there any evidence presented which would support the conclusion that no alternative single-family residential development scenario would be profitable.

development schemes, with innumerable alternatives. No evidence of the profitability of any other market than that contained in the limited engineering study was offered.

When undeveloped property is involved, a precise indicator of the economic impact of a land use restriction is its effect on the property's fair market value. In this case, there was no value established before the imposition of the zoning restriction. There is, however, proof as to the Tract's value at the time of the alleged taking. That proof is the uncontroverted evidence that Taub's Tract has a substantial value. Taub's own expert appraiser testified that the Tract had a fair market value of $7,000 per acre. His valuation of the Tract took into consideration that its use was restricted by Deer Park's zoning ordinance to single-family residential purposes. In arriving at such value, the appraiser had to conclude that it could either be profitably developed or that its profitable development was reasonably anticipated. Clearly, this evidence establishes that Taub's Tract has a substantial economically beneficial use.

Taub's proof regarding the profitability of development of the Tract for single-family residential purposes was inadequate to establish that such zoning denied him all economically beneficial use of his property. Such was the holding in the courts below.

There was no finding of fact by the trial court that the Tract could not be profitably developed as single-family residential, nor was there a finding that the City's zoning classification, or refusal to rezone, denied Taub all economically beneficial use of the Tract. (Tr. 161). To the contrary, the trial court found that Taub's Tract was suitable for use as single-family residential, that the City's zoning ordinance was not unreasonable or arbitrary, and that the refusal to rezone the Tract to multi-family residential was not

confiscatory. (Tr. 168-169; Pet. D-4). The Texas Court of Appeals concluded that Taub's evidence was insufficient to prove, as a matter of law, that *any* single-family residential development would not be economically feasible (Pet. B-4), and the Supreme Court of Texas concluded that Taub had not been deprived of all economically beneficial use of his property. (Pet. A-4).

The evidence is clear and uncontroverted that Taub held the Tract for investment purposes, and that under a single-family zoning classification it had a substantial value of at least $7,000 per acre. Considering Taub's investment-backed expectations, and the character and legitimacy of the governmental action involved, the economic impact of the City's single-family residential zoning classification clearly does not reach the threshold necessary to establish an economic taking.

Neither the decision below nor the record of this case raise the Questions Presented in the petition. The standards for review of an economic taking case established by this Court are the standards precisely followed by the Supreme Court of Texas in this case. The record clearly establishes that the City's zoning regulation was adopted to accomplish a legitimate goal and that it is substantially related to public health, safety, and general welfare. It is equally clear that Deer Park's zoning regulation has not denied Taub the economically beneficial use of his property. To the contrary, the undisputed evidence establishes that Taub's Tract has substantial value and, considering his expected use of it as an investment, a substantial economically beneficial use. The Supreme Court of Texas weighed the character of the governmental action, and the economic impact of such action on the property affected, and correctly concluded under the circumstances of this case that Taub had failed to establish a sufficiently severe economic impact to establish a taking.

The application of standards clearly established by this Court to the record in this case results in the unmistakable conclusion that Deer Park's zoning regulations do not effect an " economic taking" of Taub's Tract. The opinion of the Supreme Court of Texas is clearly in harmony with the jurisprudence of this Court. This case presents no issue of law undecided by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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